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July 22, 1999

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RANDALL W. SIFERS
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Internet Address:
rsifers@hklaw.com

Re: MM Docket No. 99-153;
File Nos. BRCT-940407KF and BPCT-940630KG

Dear Madam Secretary:

Transmitted herewith, on behalf of Reading Broadcasting, Inc., is an original and six copies of its Prehearing Brief on Scope of Issues in the above-referenced proceeding.

An extra copy of the Brief is enclosed. Please date-stamp the extra copy and return it to the courier for return to me.

If should have any question please contact Thomas J. Hutton at (202) 828-1892 or the undersigned.

Very truly yours,

HOLLAND & KNIGHT LLP



Randall W. Sifers

Enclosures

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re Applications of)	MM Docket No. 99-153
)	
READING BROADCASTING, INC.)	File No. BRCT-940407KF
)	
For Renewal of License of Station)	
WTVE(TV), Channel 51,)	
Reading, Pennsylvania)	
)	
and)	
)	
ADAMS COMMUNICATIONS)	
CORPORATION)	File No. BPCT-940630KG
)	
For Construction Permit for a)	
New Television Station On)	
Channel 51, Reading, Pennsylvania)	

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TO: Administrative Law Judge Richard Sippel

**PREHEARING BRIEF ON
SCOPE OF ISSUES**

Reading Broadcasting, Inc. ("Reading"), by its counsel and pursuant to the Presiding Officer's instructions, hereby submits this Prehearing Brief on Scope of Issues. The first section will address the relevant comparative factors other than Reading's renewal expectancy record. The second section will address the timeframe for Reading's renewal expectancy record.

1. Relevant Comparative Factors

The Commission's *First Report and Order* in the broadcast auction proceeding¹ provides the most direct guidance in determining the relevant issues here, other than Reading's renewal expectancy record. In the *First Report and Order* (§§ 209-210), the Commission first considered and rejected a two-step renewal procedure in which a renewal application would be granted if, after a threshold hearing, it was decided that the renewal applicant deserved a renewal expectancy for "substantial performance." The Commission rejected this idea because of the potential delays in litigating the legality of this approach and in reaching and resolving the second step in cases where there was not a dispositive renewal expectancy.

This sensitivity to procedural delays is a recurring theme in the *First Report and Order*. In Paragraph 212, the Commission noted the difficulty of "[d]eveloping legally sustainable criteria that would reliably predict future performance" and the "significant potential legal challenge" facing a revised set of comparative criteria.

Given its concern over procedural delays, the Commission clearly did not want to be in the situation of remanding cases because potentially relevant evidence was not admitted by the presiding officer in the case. Rather, the Commission stated: "We think the most equitable and

¹ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 13 FCC Rcd 15920 (1998) ("*First Report and Order*").

expeditious approach here would be simply to permit the renewal applicants and their challenges, within the confines of the generally phrased standard comparative issue, to present the factors and evidence they believe most appropriate.”²

At this point, neither Reading nor the challenger, Adams Communications Corporation, is required to state its position as to what is a valid comparative standard for deciding this case if the renewal expectancy factor is not dispositive. Rather, the immediate issue is what should be admitted into evidence so as to avoid a potential remand. Reading believes the following matters are relevant or potentially relevant and should be admitted into evidence:

- a. Diversification of media outlets
- b. Comparative coverage
- c. Local residence
- d. Civic involvement
- e. Broadcast experience

² *First Report and Order*, ¶ 213. See also ¶ 214:

We believe that the fairest and most expeditious approach in these cases is to decide them as nearly as possible according to the standards in effect prior to Bechtel II. We accomplish this by deciding them on a case-by-case basis, affording all parties the flexibility to present evidence they deem relevant under the standard comparative issues, and at the same time adhering to the criteria for evaluating the renewal applicant's performance during the license term to determine its eligibility for, and the comparative significance of, any renewal expectancy.

f. Specialized programming

The first two factors are completely unrelated to the integration criterion invalidated in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) (“*Bechtel II*”). While reserving its right to challenge the validity of either or both of these factors as they may be applied to the facts of this case, Reading believes that evidence should be admitted as to both factors.

Local residence, local civic involvement, and broadcast experience all were previously regarded as qualitative enhancement factors for principals proposing to be integrated into station management. Although *Bechtel II* invalidated the integration criterion, inclusion of these factors is in no way inconsistent with *Bechtel II*. The *Bechtel II* court did not find the “enhancement factors” to be arbitrary and capricious – in fact, part of the court’s reasoning in striking down the integration preference was that “the ‘quantitative’ portion of the integration credit tend[ed] to swamp the qualitative.”³ The court recognized the value of local ownership (and, implicitly, local civic involvement) in its criticism of the integration credit on the grounds that “[f]amiliarity with a community seems much more likely than station visits or correspondence to make one aware of community

³ 10 F.3d at 882.

needs,” and that “even long-time local residence generates at most a ‘qualitative’ enhancement of an applicant’s integration credit.”⁴

Civic involvement presents benefits that are similar to but distinct from local ownership. A local resident who is not active in civic affairs will not have the same level of awareness of the community as a local resident who is civically active. This factor promotes diversity in programming, just as local ownership does.

Finally, broadcast experience is relevant because an owner with broadcast experience will be in a position to serve the community’s needs and interests immediately, whereas a novice would require some time to develop that capability.

⁴ 10 F.3d at 885. Earlier Commission precedent suggests that local ownership was a matter of fundamental significance. See *Radio Jonesboro, Inc.*, 100 FCC 2d 945 (1985):

[B]oth local residence and minority ownership are fundamental considerations in our licensing scheme. Both policies complement our concern with diversification of control of broadcast ownership. Moreover, similar assumptions underlie both policies. We award enhancement credit for local residence because ... [i]t is expected that [an] increased knowledge of the community of license will be reflected in a station’s programming. Likewise, credit for minority ownership and participation is awarded in a comparative proceeding [because] “minority ownership is likely to increase diversity of content, especially of opinion and viewpoint.”

100 FCC 2d at 945 (footnotes omitted). While the Supreme Court’s decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), appears to negate the constitutional validity of the minority ownership preference, there are no such doubts with respect to the local ownership preference.

Significantly, none of the foregoing “enhancement” factors are predictive or forward-looking in nature. The *Bechtel II* court invalidated the integration credit in part because it involved unenforceable predictive judgments about future activities that could easily prove to be ephemeral.⁵ In contrast, local ownership, civic involvement and broadcast experience are all verifiable, non-predictive factors. In addition, admitting this type of evidence into the record involves no significant burden or delay.

Evidence as to WTVE’s specialized programming service should be considered as a component of the comparative criteria. Out of 16 commercial television stations in the Philadelphia market, only WTVE offers Spanish-language programming. WTVE provides Spanish-language television programming approximately 14 hours a day, including the only locally-produced Spanish-language television news programming in the Philadelphia market. This service reaches nearly 1.4 million homes via cable, as well as numerous homes receiving WTVE over the air. WTVE provides the only over-the-air Spanish-language television programming to its community of license, which has a significant Hispanic population.

Historically, in comparative cases the Commission has considered specialized programming of this nature pursuant to a specially-designated

⁵ See 10 F.3d at 881.

issue.⁶ Out of an abundance of caution, Reading is simultaneously submitting a Motion to Enlarge Issues that provides a more detailed analysis of the facts demonstrating the relevance of WTVE's Spanish-language programming in this proceeding. However, a special issue should not be necessary here because the Commission has explicitly provided for applicants "to present the factors and evidence they believe most appropriate" in determining which application will best serve the public interest.⁷ WTVE's Spanish-language programming is a compelling public interest matter to be considered in this case.

Finally, in assessing the foregoing evidence, it is important to consider related evidence that may undermine or eliminate a prospective public interest benefit. For instance, a party should not be entitled to claim a comparative coverage benefit if separate evidence indicates that the applicant's proposed facilities won't be built as proposed. The Presiding Officer must give the parties leeway to introduce evidence relevant to the question of whether an applicant will actually carry out its claims of forthcoming public interest benefits.

⁶ See, e.g., *American International Development, Inc.*, 86 FCC 2d 808 (1981); *Broadcast Communications, Inc.*, 93 FCC 2d 1176 (ALJ 1982) (subsequent history omitted).

⁷ *First Report and Order*, ¶ 213.

2. The Relevant Time Period.

The license term in question for WTVE is August 1, 1989 to August 1, 1994. However, for purposes of analyzing WTVE's claim to a renewal expectancy, the relevant term begins on March 12, 1992, the date Reading consummated the transfer of control application that took Reading out of bankruptcy. *See Fox Television Stations, Inc.*, 7 FCC Rcd 3801 (ALJ 1992) (subsequent history omitted): "The relevant period on which to evaluate Fox's performance as licensee of KTTV begins on [the date Fox acquired the station]." Although Reading did operate WTVE from 1989-1992 as a debtor-in-possession, that operation was under the supervision of a federal bankruptcy court pursuant to Chapter 11 of the Bankruptcy Code. Due to the station's financial limitations while in Chapter 11, this period cannot be deemed a reliable indicator of future performance. Equally important, when Reading did emerge from bankruptcy, there was a greater than 50% change in ownership, requiring long-form approval of a Form 315 application. Under the *Fox* case, this change of control starts the clock on March 12, 1992, the date Reading completed its transfer of control. The clock stops on August 1, 1994, the end of the first license term. *See First Report and Order* at ¶ 214.

Respectfully submitted,

READING BROADCASTING, INC.

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July 22, 1999

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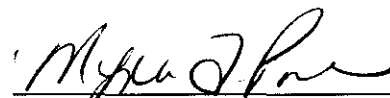
CERTIFICATE OF SERVICE

I, Myra Powe, a secretary in the law firm of Holland & Knight LLP do hereby certify that a copy of the foregoing Prehearing Brief on Scope of Issues was served, this 22nd day of July 1999, via hand delivery, to the following:

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